



October 15, 2010

BY ELECTRONIC DELIVERY

Kristi Izzo, Secretary of the Board
New Jersey Board of Public Utilities
Two Gateway Center, Suite 801
Newark, New Jersey 07102

**Re: Informal Comments Regarding the Upcoming Readoption of the
Board's Energy Competition Rules: N.J.A.C. 14:4**

Dear Secretary Izzo:

In accordance with the New Jersey Board of Public Utilities ("Board" or "BPU") notice of stakeholder meeting in connection with the above-referenced matter, Public Service Electric and Gas Company ("PSE&G"), Jersey Central Power & Light Company ("JCP&L"), Atlantic City Electric Company ("ACE") and Rockland Electric Company ("RECO") (collectively, "EDCs") hereby jointly submit the following written comments in order to provide Board Staff with input on an informal basis prior to the Board publishing a rule proposal in the *New Jersey Register* for formal comment. The EDCs look forward to discussing the issues raised herein further during the October 28, 2010 stakeholder meeting.

The EDCs do not believe now is the time to make the changes to the existing robust and balanced energy competition rules advocated in comments to date, particularly amendments that might unwittingly (1) shift costs and risks to consumers; (2) open up third-party supplier ("TPS") master agreements which were carefully negotiated, prepared and reviewed with the involvement

of Board Staff and approved by the Board; and (3) require major system changes. As part of this process, it is important that the Board remain cognizant of the potential impact on customers associated with the heightened level of customer switching that is now occurring – potential impacts both on customers served by TPSs and by customers receiving Basic Generation Service (“BGS”). Recognizing that the Energy Competition rules must be readopted by April 18, 2011, the EDCs respectfully recommend that the rules be proposed for readoption with the one minimal change sought herein to clarify N.J.A.C. 14:4-5.2.

Notwithstanding these comments, to the extent Board Staff intends to make any substantive modifications to the existing rules at N.J.A.C. 14:4, in the interests of ensuring a fully informed rulemaking proceeding, the EDCs recommend that Board Staff circulate a draft rule proposal to stakeholders and an additional informal comment period be held prior to the rule proposal publication in the *New Jersey Register*. The EDCs also request that the Board afford stakeholders the opportunity to file additional comments on matters raised at the October 28, 2010 stakeholder meeting. Proceeding in this manner would significantly aid the Board’s efforts to have this rule readoption process concluded before April 2011 when the Chapter 4 rules are presently slated to expire.

I. Introduction

The EDCs appreciate Board Staff’s leadership as well as the collaborative approach Staff has taken to analyzing the upcoming readoption of the Board’s energy competition rules. Further, the EDCs fully support the broad strokes of the energy competition rules adopted in New Jersey to permit customers to purchase electric and gas supplies from TPSs. The EDCs believe that the discipline fostered by market forces provides the means to drive down costs to

consumers and to spur the development of innovative products that will meet consumers' needs and preferences. The EDCs look forward to continuing to work with the Board and interested stakeholders so that New Jersey's energy competition goals are met in a manner that properly balances the risks being assumed by TPSs, BGS Auction suppliers, EDCs and consumers.

With this in mind, it remains critical for the Board to continue to sustain regulations that adequately protect consumers from potentially injurious practices of any TPS that might find its way into the process. In addition, the Board must remain cognizant of the impact that policies and practices affecting consumers supplied by TPS will have on consumers -- especially residential consumers -- receiving BGS. The issue of impacts on fixed price BGS customers was dormant until recently and therefore has not been fully analyzed. Prior to any modification to the existing energy competition rules, a full and frank discussion of those impacts must be had so that the risks and costs between customers served by TPSs and those customers receiving BGS are fairly and efficiently allocated.

At this early stage in the rulemaking process, the EDCs wish to raise three preliminary concerns. First, particularly in these current economic times, now is not the time to loosen the requirements associated with customer switching verification or a TPS's ability to drop a customer and thereby push the customer back onto BGS. Second, although the EDCs fully support energy competition, attempts to disproportionately shift the marketing and supply risks associated with electricity supply away from TPSs must be avoided. Third, given the on-going level of activity in switching, it is appropriate to monitor switching activity and behavior so as to assure that switching risks and costs are appropriately allocated.

II. Comments

- A. As New Jersey is seeing the first real signs of residential energy competition since the passage of EDECA over a decade ago, now is the time to allow the regulatory construct to work and not to relax the marketing and consumer protection standards in ways that could inappropriately shift costs and risks.**

The tenor of many of the comments submitted by TPSs and the retail provider trade associations that represent the TPSs is that current rules unduly interfere with the ability of customers to select alternate suppliers or impose unfair costs on the TPSs. For example, a number of the comments contend that TPSs are being required to bear an unfair share of the collection risk in the event that a TPS customer defaults on payment. They object to the current mechanism by which a defaulting TPS customer is placed on dual billing after becoming 60 days in arrears. When this occurs, the TPS becomes responsible for uncollectible amounts until such time as the customer may be returned to the utility.

Based on the filed comments, it appears that TPSs are striving to minimize their potential uncollectible amounts by sending customers the required 30-day cancellation notice as soon as the TPSs become aware of any arrearage. In many cases, TPSs apparently are able to drop the customer before the dual billing even starts. However, in some circumstances, the TPS might have to be responsible for a share of defaulting customer payments. For example, in order to minimize the potential circumstances under which a TPS might ever become responsible for uncollectibles, Gateway requests the ability to terminate customers on seven days notice. Gateway states that “a change to a 7-day notice reduces the amount of risk the TPS incurs.”¹

¹ Gateway Supplemental Comments, p. 3.

Other comments suggest that the EDC should be required to assume the accounts receivables of the TPSs and thus relieve them of all default risk.

Comments such as those discussed above incorporate the unarticulated assumption that underlies many of the TPS proposals -- that TPSs should not have any responsibility for costs associated with certain types of routine business risks, such as collecting payments from their customers. If this premise is accepted, however, the result will be that rather than having an appropriate share of these costs borne by TPSs and their customers, a disproportionate share of these costs will be socialized and billed to all customers (the bulk of whom receive BGS service). The EDCs do not believe that this outcome is necessary for the continuation of robust retail open access in New Jersey or that such a risk allocation would be fair to customers receiving BGS service.

Under the current procedures -- which reflect the outcome of comprehensive settlement discussions -- TPSs in fact bear a very small share of the uncollectibles risk associated with providing electric and gas service. The vast bulk of the uncollectibles risk is already socialized and recovered through distribution rates. The TPSs, however, want to tip the balance even more in favor of their business model and the customers they serve by shifting even more of this residual risk to all customers, which, as noted, is borne primarily by BGS customers (some of whom likely will never be accepted by the TPSs because they are viewed as poor credit risks).

Another provision that the TPS comments claim should be modified is to shorten the 14 calendar-day right of rescission period in N.J.A.C. 14:4-7.6(b)^{4,2}. Gateway asserts that “the decrease in the rescission period [to three to seven days] would not hamper consumer protection

since New Jersey already has strong rules that govern business practices.” Yet, at the precise time that Gateway is proposing to relax the rescission rules, the EDCs are aware of the growth of aggressive marketing techniques such as “multi-level selling” whereby customers are rewarded for recruiting other customers. Because the individuals marketing the service in such “multi-level selling” arrangements will not be as knowledgeable as the TPS’s own trained representatives, misunderstandings are more likely to occur.

The EDCs submit that, given the introduction of new marketing techniques and the fact that many customers are receiving service from TPSs for the first time, the Board should act very cautiously before relaxing rescission rules or other rules designed to protect consumers. These rules have been successful in protecting residential utility consumers without -- as shown by the level of switching now occurring -- imposing an undue burden on the unregulated community.³

Further, the changes proposed by the commenters fail to consider the implementation costs that will ultimately be passed on to all customers. For example, commenters have requested a change in the EDC billing format that, it has been claimed, would facilitate switching by enabling customers to identify more easily their customer number. While this type of change may appear benign, it must be recognized that modifying the format of the customer bill would likely require software changes that would be costly. The reason for the existing bill design is because some EDCs have multiple accounts on the bill that may independently be switched to TPSs, and that account information is grouped together on the bill. Those EDCs provide instructions on their respective websites on how to identify the appropriate account number and

² Gateway Initial Comments, p 9.

³ It should be noted that little has changed with respect to this issue since the Board reached this exact conclusion in its 2008 Rule Readoption. 40 N.J.R. 2526(a) (May 19, 2008) (Response to Comment 32).

this has not appeared to hinder customer switching in New Jersey or other jurisdictions. Similarly, a change such as shortening the rescission period will result in the EDCs realizing additional systems costs. While the existence of such additional costs may not be viewed as a barrier to any change in current procedures, they must be considered carefully.

B. It remains critical that the Retail Choice Consumer Protection rules at N.J.A.C. 14:7 remain robust so that consumers understand the exact terms of service being offered.

A number of comments contend that customers should be provided with the most accurate pricing information reasonably available at the start of the contract. While the EDCs agree conceptually with this contention, they do not necessarily agree with TPS proposals to relax the obligations requiring that customers be provided with comparative price information. In addition, the EDCs are concerned that TPSs may not in all cases be contractually obligated to fulfill their obligations under fixed price contract arrangements. Instead, at least some TPS arrangements include “escape hatch” provisions that allow the TPS to cancel a fixed price obligation unilaterally and send affected customers back to BGS.

For example, Constellation Energy has been marketing new retail service plans over the past few months. Constellation Energy’s offerings include plans that provide for a 12-month or 24-month “fixed price” contract that converts to variable pricing for a final six-month term. Customers that take these services also receive a \$75 or \$150 gift card to Target. If customers terminate the contract during the “fixed price” portion of the term, they are responsible for a penalty, *i.e.*, they are locked-in. The locked-in rate is not symmetrical, however, as the contract also provides as follows:

Change in Pricing and Other Terms. Notwithstanding any other provision in this Contract, *this Contract may be changed by Constellation upon the occurrence of any event beyond its reasonable control that increases the obligations of Constellation or the cost of performing such obligations under this Contract.* If we request such a change, Constellation will provide you notice of the changed prices and/or terms and conditions *and you will have an opportunity to terminate this Contract without any further obligation* by notifying us in writing within 30 days after receiving notice of the new prices and/or terms and conditions, in which case your electric generation service will terminate effective as of the next meter read date after expiration of the required notice period. You will remain responsible for any unpaid balance as of the termination date but we will not assess a termination payment⁴

The apparent effect of this provision is to give Constellation Energy the virtually unrestricted ability to shift the risk of significant electric supply cost increases onto its customers – even if such increases occur during the putative “fixed price” term of the agreement. By granting itself an “escape hatch,” the TPS renders the guarantee of a fixed price regardless of changes in market condition -- the precise reason why customers would seek fixed price arrangements -- into a nullity.

C. Customer migration needs to be monitored and studied in order to assure that the associated risks and costs are being appropriately allocated

The level of switching activity among residential and small commercial customers in New Jersey appears to be reaching unprecedented levels. This appropriately reflects the headroom that now exists between BGS rates and wholesale price for energy. Many customers now have the opportunity to lower their electric bills by becoming the customer of a TPS and, of course, will have the opportunity to return to utility-supplied BGS in the future.

⁴ See Constellation Energy Terms and Conditions (available at http://home.newenergy.com/Content/TermsAndConditonsDocs/Residential%20TCs_072310_Web_PSEG30.pdf) (emphasis added).

Customer switching activity, however, does not occur in a vacuum. Changing suppliers affects not only the customers that switch. The BGS customers who do not switch are also affected. In addition, because switching from (and returning to) BGS affects the supply obligations of the BGS Suppliers, switching also can be expected to have impacts on the bidding behavior of participants in future BGS auctions. Indeed, as discussed above, TPS arrangements are designed to utilize switching rules in order to shift as much of the supply risk away from themselves as possible.

The Board needs to monitor and study the current situation as it unfolds in order to assure that switching costs and risks are being appropriately allocated. For present, at a minimum, the Board should collect additional data on switching patterns and their impacts. If it appears that customer migration could have deleterious impacts on BGS or BGS customers, the Board needs to be in a position to address those impacts before they fester.⁵

D. The EDCs recommend one minor change to N.J.A.C. 14:4-5.2 consistent with the Board's actions during the 2008 Energy Competition rulemaking process.

N.J.A.C. 14:4-5.2, pertaining to energy licensing and registration, is applicable to Clean Power Marketers ("CPM"). Yet, the anti-slamming provisions in Subchapter 2 are only applicable to electric power suppliers and natural gas suppliers. During the 2008 rulemaking process, PSE&G raised these concerns and the Board's response in the rule adoption process was as follows:

⁵ PSE&G filed comments in the BGS docket ER10040287 on October 1, 2010, urging the BPU to begin a stakeholder process now to consider the impacts of switching and whether the current switching rules should be modified. PSE&G reiterates its suggestion here and submits that the current situation facing the Board appears to require a reevaluation of the procedures surrounding switching to assure fair treatment of customers and the appropriate allocation of risks between BGS suppliers and TPSs.

RESPONSE: The Board is aware that there may be a potential for slamming type problems with marketing and enrollment practices of CPMs. However, including CPMs in the anti-slamming rules would be a substantive change requiring a further rule proposal. In addition, the Board also must consider whether other provisions currently applicable to TPSs should be applied to CPMs. The Board may also determine that additional public input on this issue is necessary. After considering these issues, the Board will determine whether to extend the anti slamming provisions to CPMs and will consider issuing a rule proposal in this regard.⁶

The EDCs continue to recommend that the language of the proposed anti-slamming regulations be modified to make the inclusion of Clean Power Marketers clear.

III. Conclusion

The EDCs continue to believe that the Board's existing regulations strike the best possible balance between the interests of consumer protection and competition. Once again, the EDCs commend Board Staff for the collaborative approach it has taken to this process and look forward to continuing to work with Board Staff and interested stakeholders as this rulemaking process continues.

⁶ 40 N.J.R. 2526(a) (May 19, 2008) (Response to Comment 7).

Respectfully submitted by the EDCs listed on the attached signature page:

Public Service Electric and Gas Company

By: *Alexander C. Stern*
Alexander C. Stern, Esq.
Assistant General Regulatory Counsel
PSEG Services Corporation

Rockland Electric Company

By: *John L. Carley*
John L. Carley, Esq.
Assistant General Counsel

Jersey Central Power & Light Company

By: *Marc B. Lasky*
Marc B. Lasky, Esq.
Morgan, Lewis & Bockius LLP

Atlantic City Electric Company

By: *Philip J. Passanante*
Philip J. Passanante, Esq.
Assistant General Counsel